(6) (5) (5) (6)

Nos. 87-976, 87-977, 87-979 and 87-1091

Supreme Court, U.S.
FILED
MAR 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

(Other cases listed on inside cover)

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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March 16, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

(6)

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

CITY OF WILLCOX, ARIZONA, and
ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

SOUTHERN CALIFORNIA GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

QUESTIONS PRESENTED

1. Whether the petitions for writ of certiorari are moot as to the vacated Order 436 program and premature as to the still non-final successor program (Order 500)?

2. Whether the Federal Energy Regulatory Commission ("FERC") acted within its authority under the Natural Gas Act and the Natural Gas Policy Act of 1978 ("NGPA") to prohibit undue discrimination among potential customers as a condition for a pipeline's receiving *blanket, self-implementing* authorizations to transport natural gas for others in interstate commerce?

3. Whether FERC's imposition of an antidiscrimination condition upon a voluntary, self-implementing blanket transportation program unlawfully requires pipelines to become "common carriers" when pipelines remain free to apply for individual certificates of public convenience and necessity on a traditional, case-by-case basis?

4. Whether Southern California Gas Company's challenge to the optional expedited certificate ("OEC") procedure is unripe given that the OEC procedure has not injured, and may never injure, Petitioner or anyone else by permitting a so-called "bypass" of Petitioner's or anyone else's local distribution company system?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents the Process Gas Consumers Group ("PGC"), the American Iron and Steel Institute ("AISI"), and The Fertilizer Institute ("TFI") respectfully request that this Court deny the Petitions for Writ of Certiorari sought herein in Docket Nos. 87-976, 87-977, 87-979, and 87-1091 to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987); J.A. at 124a.

STATEMENT OF THE CASE

Federal Energy Regulatory Commission ("FERC") Order No. 436,[1] challenged here by Petitioners, offers

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[1] Order No. 436, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42,408 (Oct. 18, 1985), 1982-1985 FERC Stats. & Regs. Preambles (CCH) ¶ 30,665 (1985); Order No. 436-A, 50 Fed. Reg. 52,217 (Dec. 23, 1985), 1982-1985 FERC Stats. & Regs. Preambles (CCH) ¶ 30,675 (1985); Order No. 436-B, 51 Fed. Reg. 6,398 (Feb. 24, 1986), III FERC Stats. &

natural gas pipelines that seek approval to transport gas for others in interstate commerce an alternative to the traditional certification procedures that have been utilized since the enactment of the Natural Gas Act ("NGA") in 1938.[2] Order No. 436 offers pipelines an option to obtain "blanket", self-implementing transportation authority, pursuant to Section 311[3] of the Natural Gas Policy Act of 1978 ("NGPA")[4] and Section 7(c) of the NGA,[5] to transport natural gas for others without traditional case-by-case FERC review. In return for such a broad grant of authority, a pipeline must agree to implement certain rate and tariff conditions and to provide transportation authorized by Order 436 on a nondiscriminatory basis. Pipelines that are unwilling to comply with the rule's protections against unduly discriminatory and anticompetitive conduct remain free to utilize traditional NGA Section 7(c) individual certificate procedures.

Petitioners[6] ask this Court to eliminate Order No. 436's nondiscrimination requirement for blanket transportaton authority. Since no petitioner disputes FERC's authority to approve a properly conditioned blanket transportation program, it appears that Petitioners are asking for blanket authority to transport third parties' gas while retaining the absolute freedom to pick and

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Regs. Preambles (CCH) ¶ 30,688 (1986); Order No. 436-C, 51 Fed. Reg. 11,566 (Apr. 4, 1986), 34 FERC (CCH) ¶ 61,404 (1986); Order No. 436-D, 51 Fed. Reg. 11,569 (Apr. 4, 1986), 34 FERC (CCH) ¶ 61,405 (1986); Order No. 436-E, 51 Fed. Reg. 11,566 (Apr. 4, 1986), 34 FERC (CCH) ¶ 61,403 (1986).

[2] Natural Gas Act, 52 Stat. 821, 15 U.S.C. §§ 717-717w (1982).

[3] 15 U.S.C. § 3371 (1982).

[4] 15 U.S.C. §§ 3301-3432 (1982).

[5] 15 U.S.C. § 717f(c) (1982).

[6] The Interstate Natural Gas Association of America ("INGAA"), the City of Willcox, Arizona and the Arizona Electric Power Cooperative, Inc. (jointly "AEPCO") and Texas Eastern Transmission Corporation ("TETCO") (collectively "Petitioners").

choose among prospective shippers without any regulatory restaint on anticompetitive or unduly discriminatory practices.

The need for blanket, self-implementing transportation authority has not been caused by regulatory changes initiated by FERC, but instead arises from profound market changes in the natural gas industry subsequent to the enactment of the NGPA. The fundamental factor giving rise to this need was the emergence, as a result of pipeline post-NGPA purchasing practices, of a natural gas market plagued by rising prices at the burnertip (*i.e.*, the point of use) even as a natural gas surplus continued to grow and the price of competing fuels declined. Consequently, consumers and local distribution companies ("LDCs") sought access to transportation for gas that they purchased directly from producers, and many producers sought access to transportation in order to sell their gas. For their part, pipelines generally favored self-implementing transportation as a means to preserve markets—and revenue—that might otherwise be lost in an increasingly competitive marketplace.

FERC's extensive rulemaking record demonstrates that all segments of the industry recognize the desirability of self-implementing, blanket transportation authority. Unlike FERC's traditional practice of reviewing individual proposed transactions on a case-by-case basis to determine whether the public convenience and necessity would be served by the transaction—a process which may take months or longer—a blanket certificate provides authority for initiation of new transportation arrangements and termination of old transactions without further regulatory action. As a result, a pipeline can react to market demand for transportation of third-party gas as it arises, not after the delays inherent in traditional regulatory review.

FERC designed the Order No. 436 regulations based on two years of experience with prior blanket transporta-

tion programs, judicial guidance, and an extensive rulemaking record of unduly discriminatory and anticompetitive transportation practices by interstate pipelines. FERC's first attempt to implement a broad blanket transportation program, Order No. 234-B,[7] was riddled with discriminatory and anticompetitive behavior by natural gas pipelines. Although the Order No. 234-B program, in the context of FERC's overall transportation programs, was facially neutral, interstate pipelines generally implemented the program in an anticompetitive and discriminatory manner by transporting market-priced gas solely to fuel-switchable users and local distributors that already had low-priced alternatives, while refusing to transport natural gas that would compete with their own high-priced sales to captive markets. Consequently, "captive" customers—those without alternative fuel or other gas supplies—were restricted to more expensive pipeline-owned gas supplies at the same time that interstate pipelines willingly transported less expensive gas sold by producers and independent marketers to noncaptive customers.

In 1985, the U.S. Court of Appeals for the District of Columbia Circuit vacated the Order No. 234-B blanket transportation rule because it failed to guard against unduly discriminatory and anticompetitive transportation practices by interstate pipelines. The court cited the Natural Gas Act's explicit ban on undue discrimination, FERC's duty to protect consumers from exploitation by natural gas companies, and its obligation to consider antitrust policies. The court held that the program would have to terminate unless the Commission either (a) conditioned the blanket certificates granted by that rule upon a pipeline's performance of nondiscriminatory transportation, or (b) justified a decision not to include

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[7] Order No. 234-B, 48 Fed. Reg. 34,872 (Aug. 1, 1983), 1982-1985 FERC Stats. & Regs. Preambles (CCH) ¶ 30,476 (July 20, 1983).

such a condition.[8] The *MPC* court subsequently stayed its mandate until October 31, 1985,[9] in order to afford FERC time to complete rulemaking proceedings which culminated in Order No. 436.

In addition to the centerpiece of blanket, self-implementing transportation, Order No. 436 also established a new optional expedited certification ("OEC") procedure to authorize new sales and transportation services and related facilities. A broad range of new services may be authorized by the OEC regulations, including interstate pipeline sales or transportation service to other pipelines, local distribution companies, or end users. In return for pipeline agreement to provide certain safeguards designed to protect its ratepayers, including acceptance of the full risk of the transaction, the OEC regulations provide a rebuttable presumption that the proposed service or facility is in the public interest. Unless that presumption is rebutted by a protesting party, the FERC may grant a certificate without lengthy formal administrative proceedings. Petitioner Southern California Gas Company attacks the OEC regulations based on the possibility that at some future time a pipeline may seek to use the procedures to "bypass" a local distribution company and provide service directly to an end user. No such bypass has occurred, however, pursuant to an OEC certificate during the nearly two and one-half years since the regulations were promulgated.

REASONS FOR DENYING THE PETITIONS

I. CERTIORARI MUST BE DENIED BECAUSE PETITIONERS' CLAIMS ARE MOOT AND/OR PREMATURE.

The target of Petitioners' complaints—FERC Order Nos. 436, *et seq.*—was *vacated* by the court of ap-

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[8] Maryland People's Counsel v. FERC, 761 F.2d 780, 788-89 (D.C. Cir. 1985) (*"MPC II"*).

[9] Maryland People's Counsel v. FERC, 768 F.2d 1354 (D.C. Cir. 1985).

peals,[10] and FERC has not petitioned for further judicial review in order to preserve these orders. Instead, FERC returned to the drawing board to design a new blanket transportation rule responsive to the D.C. Circuit's decision—an action which it has not yet completed. Pending development of the new final rule, FERC promulgated interim blanket transportation regulations.[11] This action was necessary to prevent virtual chaos in the natural gas industry, which would have resulted from termination of ongoing transportation arrangements.

While the Order No. 500 interim rules repromulgate most of the Order No. 436 regulations, there are changes in the antidiscrimination rules which, *inter alia*, limit the scope of participating pipelines' transportation obligations with respect to gas sold by producers that have ongoing take-or-pay claims. Thus, Petitioners' arguments for a writ of *certiorari* reflect either (1) a moot challenge to Order Nos. 436, *et seq.* or (2) a premature and misplaced challenge to Order Nos. 500, *et seq.*[12]

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[10] Associated Gas Distributors v. FERC, 824 F.2d 981, 1044 (D.C. Cir. 1987); J.A. at 124a (*"AGD"*).

[11] Order No. 500, Interim Rule and Statement of Policy, 52 Fed. Reg. 30,334 (August 14, 1987), III FERC (CCH) ¶ 30,761 (1987); Order No. 500-A, 52 Fed. Reg. 39,507 (October 22, 1987), III FERC (CCH) ¶ 30,770 (1987); Order No. 500-B, 52 Fed. Reg. 39,630 (October 23, 1987), III FERC (CCH) ¶ 30,772 (1987); Order No. 500-C, 52 Fed. Reg. 48,986 (December 29, 1987), III FERC (CCH) ¶ 30,786 (1987); Order 500-D, Docket Nos. RM87-34-000 through 053, issued March 8, 1988; *appeals docketed sub noms.* American Gas Association v. FERC, No. 87-1588 (D.C. Cir. Oct. 19, 1987); Shell Offshore, Inc. and Shell Western E&P, Inc. v. FERC, No. 87-4749 (D.C. Cir. Oct. 19, 1987).

[12] AEPCO goes further and implicitly seeks judicial review of FERC orders in other unspecified dockets. For example, to buttress its arguments AEPCO claims that the FERC has uniformly applied "open access" requirements to individual NGA Section 7(c) certificates issued after Order No. 436. No such requirement is imposed by Order No. 436, and there is no basis in the record for such a claim. If AEPCO has a dispute, it must seek relief, if at all, on

Petitioners' claim that the Order No. 436 rules survive the Circuit Court's mandate is wrong: the Commission has not promulgated any final rule on remand, and the interim rules differ in significant respects from the rules challenged here. Although most of Order 436 has been repromulgated in the interim rules, the new interim regulations—which, thus far, are embodied in Order Nos. 500, 500-A, 500-B, 500-C and 500-D—have added a new subsection [13] which allows pipelines to choose to deny transportation of certain producers' gas unless the pipeline receives concessions regarding outstanding take-or-pay liabilities.[14] This new provision responds to the pipelines' major concern in the original rulemaking, and it substantially limits the so-called "open access" condition promulgated by Order No. 436 by giving pipelines an element of choice as to whose gas will be transported under the blanket authority.

In light of the fact that Order No. 436 no longer exists and the as-yet-interim successor rules limit the condition about which the Petitioners complain, Petitioners' claims are moot as to Order No. 436 and premature as to Order No. 500. The FERC has agreed to make modifications responsive to the D.C. Circuit's decision and is

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review of those individual certificate orders. Similarly, complaints against the Order No. 500 interim rule must be resolved in the proceedings already underway to review that order. *See* n.11, *supra*.

[13] To be codified at 18 C.F.R. §§ 284.8(f) and 284.9(f); *see* App. A at 3a-10a, 11a-18a.

[14] In so circumscribing the "open access" regulations, FERC followed the suggestions of two of the petitioners herein, INGAA and TETCO. *See* Comments of the Interstate Natural Gas Ass'n of America, FERC Docket No. RM85-1-000 at 13, 17 (filed July 15, 1985) (R. 4753, 4757); Comments of Texas Eastern Transmission Corp., FERC Docket No. RM85-1-000 at 23 (filed July 15, 1985) (R. 2405); Initial Brief of Texas Eastern Transmission Corp. in Associated Gas Distributors v. FERC, No. 85-1811 at 6 (D.C. Cir., filed May 30, 1986). These Petitioners cannot legitimately claim that the unmodified "open access" provisions are ripe for review at this time.

in the process of doing so. The crux of Petitioners' problem, then, appears to be that they are unhappy that the D.C. Circuit did not prohibit any imposition of an antidiscrimination condition upon a blanket transportation program as being beyond FERC's statutory authority. However, delimiting FERC's authority in the abstract is not the appropriate function of Supreme Court review.

This Court has previously recognized that, where an agency exercised its "perogative not to seek review of the invalidation of certain regulations" or where the agency admits that certain essential modifications are necessary, further review would amount to the rendering of an advisory opinion. *EPA v. Brown*, 431 U.S. 99, 103-04 (1977); *see also Center for Science in the Public Interest v. Regan*, 727 F.2d 1161 (D.C. Cir. 1984). Such would be the result here if the Court choose to review, prior to final agency action and Court of Appeals review, now void regulations which the agency is in the process of modifying.

To the extent that Petitioners seek to challenge the Order No. 500 regulations before FERC issues a final rule, their claims are not yet ripe. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). Similarly, a writ of *certiorari* is not warranted here on a theory that this is a case involving issues that are capable of repetition, yet evading review. *See, e.g., Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911). In response to the D.C. Circuit's opinion, FERC's interim rules have altered the agency's course, *inter alia*, by restricting the availability of "open access" transportation to deal with pipelines' take-or-pay concerns. To be sure, it is highly unlikely that the new final rule will accept the Petitioners' claim that pipelines are entitled to an unfettered right to discriminate among potential customers under a blanket transportation certificate. But the Petitioners can seek judicial review of the new final rules, with the

new access restrictions, when these rules become final.[15] There is no basis for fearing recurring mootness. More importantly, the Court's ability to resolve the issues will be better framed once FERC has promulgated those final rules.

II. NO BASIS EXISTS FOR FURTHER REVIEW OF FERC'S IMPOSITION OF AN ANTIDISCRIMINATION CONDITION UPON ITS OFFER TO PIPELINES OF BLANKET, SELF-IMPLEMENTING TRANSPORTATION AUTHORITY.

A. Adoption of the Nondiscrimination Condition Was Both Lawful and Appropriate.

Petitioners contend that, in imposing a nondiscrimination condition upon the blanket transportation authorizations of 18 C.F.R. §§ 284.8 and 284.9, FERC acted *ultra vires* of its enabling legislation.[16] This claim is patently wrong. In effect, Petitioners seek pregranted blanket, self-implementing authority to transport for whomever they choose without any restrictions designed to prevent undue discrimination, preferences or anticompetitive abuses of their monopoly power over essential transportation facilities. Their attempts to shield their anticompetitive practices behind a "common carrier" label are nothing but a ploy to avoid statutory prohibitions against undue discrimination.

To transport natural gas in interstate commerce, an interstate pipeline must first obtain from FERC a certificate of public convenience and necessity under NGA Section 7(c) authorizing the transaction, or it must obtain prior FERC approval under NGPA Section 311. The burden of proving that the public interest is served by a transaction is upon the pipeline. Traditionally,

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[15] Several parties have sought judicial review of Order No. 500. *See* n.11, *supra*.

[16] INGAA at 14; *see* TETCO at 5, AEPCO at 24; *see also* Brief in Support of ANR Pipeline Company and Colorado Interstate Gas Company ("ANR") at 7-9.

pipelines have followed the procedures outlined at 18 C.F.R. Part 157 of FERC's regulations, and have obtained specific certificate authority for each transportation in advance of performing the service. Applying for specific certificate authority under NGA Section 7(c) is a time-consuming process that entails identifying the individual customers to be served, the points of receipt and delivery of the gas, the volumes of gas, and the terms and conditions of service. Following public notice of the specific proposed transaction, FERC receives public comments. Based either on the filings or a formal hearing record, FERC will approve or disapprove the individual proposal, possibly imposing conditions deemed necessary to protect the public interest or to prevent discrimination.[17]

Order No. 436 offered pipelines an alternative to case-by-case review. As set forth at 18 C.F.R. Part 284, a pipeline may elect to obtain blanket authority under which it may transport for any shipper on a "self-implementing" basis, *i.e.*, without having obtained prior Commission authorization.[18] The blanket authorizations permit the pipeline to add new transportation customers (*i.e.*, new "shippers"); increase or decrease the volumes of gas it transports for any customer; change points of receipt and delivery; extend the term of an arrangement; and selectively discount the rates at which it offers its transportation services to particular customers in order to meet the competition.

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[17] FERC's conditioning authority is clearly established by Section 7(e) of the NGA, 15 U.S.C. § 717f(e) (1982), as well as by Section 311(c) of the NGPA, 15 U.S.C. § 3371(c) (1982). *See generally* Atlantic Ref. Co. v. Public Serv. Comm., 360 U.S. 378, 388-89 (1959).

[18] FERC granted blanket transportation authority in two forms. Under Section 7(c) of the NGA, a pipeline may obtain a blanket certificate of public convenience and necessity. Under NGPA Section 311, FERC's rules allow a pipeline to initiate transportation service merely by filing tariffs and performing the services.

Under the Order No. 436 program, interstate pipelines are offered tremendous flexibility to respond promptly to market opportunities because they need not seek FERC review of each individual proposed transaction. *Nevertheless, because FERC remains legally obligated to protect consumers from excessive rates, from exploitation at the hands of natural gas companies, and from undue discrimination and preferences,*[19] *FERC's grant of self-implementing authority is necessarily conditioned to protect the public from unjust, unreasonable and discriminatory behavior by participating pipelines.* That is, as a substitute for prior consideration of the merits of each individual transaction, FERC established certain requirements for participation in this self-implementing transportation program. One of those requirements is that participating pipelines must be willing to transport gas for all qualified customers without undue discrimination. Any pipeline which objects to Order 436's antidiscrimination condition retains the right to seek case-by-

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[19] NGA Section 4, 15 U.S.C. § 717c (1982), states in pertinent part that neither the transportation of natural gas nor its sale for resale may result in undue preference or advantage, or subject any person to undue prejudice or disadvantage. NGA Section 5, 15 U.S.C. § 717d (1982), prohibits unjust, unreasonable, unduly discriminatory or preferential rates, charges, or classifications, and it affirmatively requires FERC to remedy such conditions whenever it finds that such discriminatory practices exist. These principles are incorporated into FERC's duty under NGA Section 7(e), 15 U.S.C. § 717f(e) (1982), to impose such conditions on certificates as are necessary to serve the public convenience and necessity. *See* Atlantic Ref. Co. v. Public Serv. Comm'n, 360 U.S. 378, 388-89 (1959); FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944); *see also* Natural Gas Act Section 7(e), 15 U.S.C. § 717f(e) (1982). The courts have read Section 7 broadly to uphold certificate conditions imposed by FERC. *See* Tennessee Gas Pipeline Co. v. FERC, 689 F.2d 212, 214-15 (D.C. Cir. 1982) (broad authority to condition certificates); Transcontinental Gas Pipe Line Corp. v. FERC, 589 F.2d 186, 190 (5th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980) (conditioning certificates to ensure appropriate allocation of risk); Alabama-Tennessee Nat. Gas Co. v. FPC, 203 F.2d 494, 500 (3d Cir. 1953) (imposition of rate conditions).

case approval for individual transportation transactions, just as they did for the first 40 years under the NGA.

There is no merit to Petitioners' claim that FERC did not "discover" its antidiscrimination power for nearly 50 years under the NGA and, thus, no such power exists. In reality, it was more than 40 years after the NGA was enacted before FERC first granted *blanket* transportation authority to interstate pipelines. Before such blanket authority was offered, incorporating explicit antidiscrimination rules into regulations was unnecessary because the antidiscrimination requirement is in the law and specific issues could be considered case-by-case. Since Order 436 avoids case-by-case review, the antidiscrimination condition must be established up front.[20]

Based on the record compiled in its rulemaking and two years of experience with a blanket program that lacked explicit antidiscrimination conditions, FERC concluded that, in the past, pipelines had abused a previous grant of blanket authority and performed self-implementing transportation services in an unduly discriminatory and anticompetitive manner.[21] Specifically, interstate pipelines had used their monopoly power over transmission facilities to restrain competition and to enhance their profits at the expense of consumers by maintaining noncompetitive rates for their own gas sales. Pipelines blatantly discriminated against captive LDCs and consumers: selectively transporting low-priced spot-market gas to users and LDCs that could switch to other suppliers of gas or alternative fuels, while forcing captive customers to buy the pipelines' overpriced gas. Further,

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[20] The courts have held that Congress intended to commit *to the Commission*, and not to the pipelines themselves, "the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination." Michigan Consolidated Gas Co. v. FPC, 203 F.2d 895, 901 (3d Cir. 1953).

[21] Order No. 436, *supra* note 1, at 31,511; *AGD*, 824 F.2d at 993, 996; J.A. at 17a, 23a.

pipelines blatantly discriminated among gas producers, forcing many producers to shut in their supplies because they could not gain access to markets. Interference with natural gas price adjustments, resulting from pipelines' practices, FERC found, was causing "a very large loss to the American economy in jobs, production, and net economic efficiency."[22] From these record findings, FERC concluded that the discriminatory transportation practices of pipelines in particular, and the overall regulatory framework in general, were "allowing rates, charges, and practices which are unjust, unreasonable, and unduly discriminatory under Section 5 of the [Natural Gas Act]."[23] Under the circumstances, FERC could no longer leave to the pipelines the choice of which customers to serve under blanket authority; it was obligated under Section 5 of the NGA to remedy that discrimination in establishing the new blanket transportation program, Order No. 436.[24]

Moreover, the antidiscrimination condition in Order 436 was directly responsive to judicial guidance. The D.C. Circuit had specifically vacated the prior Order No. 234-B transportation program because the Commission had granted blanket transportation authority to pipelines but had failed to bar the undue discrimination which so predictably would result. In *Maryland People's Counsel v. FERC*, 761 F.2d 780 (D.C. Cir. 1985) ("*MPC II*"), with Justice Scalia on the panel, the court unanimously vacated that program. The court reminded FERC, *inter alia*, of its overriding duty to protect consumers from

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[22] Order No. 436, *supra* note 1, at 31,489. The *AGD* court noted that pipelines did not challenge FERC's findings as to the "extreme factual circumstances now present in the gas industry." 824 F.2d at 999-1000; J.A. at 30a.

[23] Order No. 436, *supra* note 1, at 31,490.

[24] NGA Section 5(a) is mandatory in its wording. It requires FERC to act upon finding that any natural gas company engaged in unduly discriminatory or preferential acts by ordering a just and reasonable practice to be observed thereafter.

monopolistic excesses of pipelines as well as of its duty to stand as a first line of defense against violations of the antitrust laws[25] and specifically held that FERC must condition the broad transportation program at the outset to prevent undue discrimination. *MPC II*, 761 F.2d at 787. FERC could not adequately perform its duties, the court held, by granting open-ended authority to pipelines and leaving it to consumers to try to protect themselves from discrimination through complaints.[26]

The nondiscrimination condition about which Petitioners so vociferously complain is the minimal prerequisite which must be imposed by FERC if it is going to grant pipelines *blanket* authority for self-implementing transportation. FERC is not only *empowered* to impose a nondiscrimination requirement as a condition for blanket authority to engage in a self-implementing interstate transportation—it is *compelled* to do so by Sections 4, 5 and 7 of the NGA and its own findings of fact in the Order No. 436 rulemaking. FERC is likewise empowered under Sections 311(a), 311(c) and 501(c) of the NGPA to impose a similar nondiscrimination requirement on the portion of its new program that entails transportation authorized under the NGPA.[27]

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[25] 761 F.2d at 787, *citing* Gulf States Utilities Co. v. FERC, 411 U.S. 747, 760 (1973); *see also* California v. FPC, 296 F.2d 348, 353-54 (D.C. Cir. 1961) (antitrust policies should be involved in deliberations concerning proposed certificates); City of Pittsburgh v. FPC, 237 F.2d 741, 754 (D.C. Cir. 1956) (asserting inherent power of Commission to take into account antitrust law and policy); *cf.* FPC v. Conway Corp., 426 U.S. 271, 276-79 (1976) (Commission must consider discrimination and anticompetitive consequences *before* granting approvals under the Federal Power Act).

[26] 761 F.2d at 787. Similarly, in Maryland People's Counsel v. FERC, 761 F.2d 768 (D.C. Cir. 1985) ("*MPC I*"), Justice Scalia, writing for a unanimous court, reversed a related blanket program—a so-called "special marketing program"—because of undue discrimination countenanced thereunder.

[27] FERC has broad authority to condition transportation authorized under NGPA Section 311(a), 15 U.S.C. § 3371(a) (1982),

Mindful of its regulatory responsibilities as recently articulated in *MPC I* and *MPC II*, and taking into account the record it had compiled, FERC confronted two possibilities. *First*, it could have denied pipelines any blanket transportation authority, leaving them to proceed case-by-case, with advance scrutiny of each individual transportation arrangement. Or, *second*, it could use its authority to develop an optional, blanket program with a nondiscriminatory access condition. The Commission could *not*, however,—as Petitioners would have it—grant blanket transportation authority that would allow pipelines to transport whenever and for whomever they choose.[28] Under these circumstances, FERC selected the only feasible option that would still afford pipelines the option of performing self-implementing transportation—FERC granted blanket authority subject to anti-discrimination conditions.

Lastly, if pipelines do not like the blanket transportation rules, they remain free to seek individual Section 7(c) certificates to perform transportation on a transaction-by-transaction basis. There is no merit to the complaint that pipelines lack choice or that the choice is one between the noose and a firing squad.[29] The option

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which states that FERC "may" authorize transportation by "rule or order." Section 311(c), 15 U.S.C. § 3371(c) (1982), expressly gives FERC broad power to establish the terms and conditions of transportation authorized under Section 311(a). Indeed, the statute authorizes FERC to deny Section 311 transportation altogether if it finds that such transportation would be incompatible with the public interest or with the NGPA's goal of achieving and preserving competitive wellhead pricing. Similarly, NGPA Section 501(c) provides that FERC "is authorized to perform any and all acts," and to "prescribe, issue amend, and rescind such rules and orders as it may find necessary and appropriate to carry its functions under this Act." 15 U.S.C. § 3411(a) (1982).

[28] *MPC II*, 761 F.2d 781-82; *MPC I*, 761 F.2d at 779.

[29] *AGD*, 824 F.2d at 1024. This colorful phrase appears to be one of the "stray observations" in the *AGD* opinion that inspired the concurring opinion of Judge Mikva. *See AGD*, 824 F.2d at 1044

of case-by-case approval is all that pipelines had for the first 40 years of regulation and it is all that the law requires. Many pipelines—including Petitioner Texas Eastern—have, in fact, refused or are currently refusing to implement blanket transportation services.[30]

In sum, in light of the specific record evidence, the nondiscrimination condition adopted by FERC as part of its optional blanket grant of authority simply enforces the statutory ban on undue discrimination, preferences and unjust and unreasonable rates and services. Moreover, this condition appears to be the only *effective* mechanism to prevent unduly discriminatory practices under self-implementing blanket certificates.[31]

B. FERC's Nondiscriminatory Access Condition Is Neither Compulsory Nor Does It Require Gas Pipelines to Transport Gas As Common Carriers.

AEPCO argues that Order No. 436 and the nondiscriminatory access rules therein will "radically transform" gas pipelines into common carriers. (AEPCO at 9.) Both FERC and the *AGD* court correctly rejected the argument that FERC's "open access" condition is

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(Mikva, J., concurring). The expert agency found that the program is voluntary and structured its rules to assure the availability of the traditional Section 7(c) option. Experience has borne this out. *See* n.30, *infra*.

[30] Many pipelines have "opened" and then "closed" their systems, taking full advantage of the voluntary aspect of the program. As of the date of printing hereof, only 10 of the 24 major interstate pipeline companies have accepted a blanket certificate under Order No. 436/500. They are: ANR Pipeline Co., Columbia Gas Transmission Corp., Columbia Gulf Transmission Co., Consolidated Gas Transmission Corp., Natural Gas Pipeline Co. of America, Northern Border Pipeline Co., Northern Natural Gas Co., Tennessee Gas Pipeline Co., Trunkline Gas Co., and United Gas Pipe Line Co.

[31] *Cf.* Permian Basin Area Rate Cases, 390 U.S. 747, 780 (1968) (absent compelling evidence of a contrary congressional intent, courts may not prohibit administrative action that is imperative to the achievement of an agency's ultimate purposes).

equivalent to a "common carriage" requirement. (824 F.2d at 997; J.A. at 24a.) *Certiorari* should not be granted to reward Petitioners for their war of labels.

First, Order No. 436 does not mandate common carrier status. It does not *require* pipelines to transport for anyone.[32] Order No. 436 merely states that if pipelines elect to transport on a self-implementing basis, without prior Commission review and approval, they must agree to do so in an open and nondiscriminatory manner. Second, the concept of "common carriage" is legally distinct from that of nondiscrimination.[33] The NGA has long prohibited "undue discrimination" or "preferences" and required FERC to remedy discrimination; yet the NGA is not viewed as "common carrier" law.[34]

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[32] FERC asserted that a primary distinction between its actions in Order No. 436 and common carriage is that "a principal attribute of common carrier status [is] its *mandatory* nature." Order No. 436, *supra* note 1, at 31,500. The *AGD* court saw the competitive and economic forces surrounding the decision by a pipeline whether or not to transport in accordance with Order No. 436 as nullifying the "voluntariness" rationale. 824 F.2d at 1014; J.A. at 62(a).

[33] In *Pennsylvania Railroad v. Sonman Shaft Coal Co.*, 242 U.S. 120, 123-26 (1916), for example, the Court allowed a coal company which had received from a railroad fewer cars than it had requested for transportation of its coal, to maintain an action against this unfair and discriminatory treatment independent of its claims arising under the Interstate Commerce Act. The Court recognized a duty to avoid discriminatory treatment as distinct from the duty to abide by common carrier regulation. *Id.*

[34] The distinction between common carriage and nondiscriminatory access is also recognized in several federal statutes regulating gas pipelines. In the Mineral Leasing Act, 30 U.S.C. § 185(r)(2)(A), for example, gas pipelines are made subject to a nondiscriminatory access condition, but are exempted from common carrier provisions applicable to oil pipelines under Section 185 (r)(3)(A). *See also* S. REP. No. 207, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2417, 2440 (nondiscrimination requirement is not limited by qualified exemption of gas pipelines from common carrier requirements). The Outer

If gas pipelines operating under Order No. 436 must be labelled, it is evident that they are acting not as "common carriers" but as "contract carriers," under the traditional meaning of that term. The legal distinction between "contract" (or private) and "common" carriers has been described as "difficult to establish" in practice and attended by "confusion" and "turmoil." [35] The at-

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Continental Shelf Lands Act Amendments of 1978 require oil and gas pipelines operating in the Outer Continental Shelf ("OCS") to "provide open and nondiscriminatory access to both owner and non-owner shippers." 30 U.S.C. § 1334(f)(1)(A). Again, however, this language was deemed not to be the equivalent of imposing common carrier status on such pipelines. *See* H. REP. No. 1474, 95th Cong., 2d Sess. 87 (1978); H. REP. No. 590, 95th Cong., 1st Sess. (1977) (bills requiring OCS pipelines to be operated as common carriers rejected). Section 13(a) of the Alaska Natural Gas Transportation Act, 15 U.S.C. § 719k ("ANGTA"), requires that certificates be conditioned to provide that no person seeking to transport gas on the system may be discriminated against based on the degree of ownership. FERC's Office of the General Counsel analyzed the legislative history of ANGTA and concluded that Congress did not intend the Alaskan gas pipeline to be a common carrier. *See* Northwest Alaskan Pipeline Co., 3 FERC (CCH) ¶ 61,226 at 61,604-07 (1978).

[35] *See* Campbell, *The Contract Carrier: A History of the Concept*, 29 I.C.C. PRAC. J. 952, 958 (May 1962); Hirschbach, *The Contract Motor Carrier—A Substitute for Private Carriage or a Common Carrier in Disguise?*, 18 S.D.L. REV. 10, 12 (Winter 1973); *see generally* L. Gorton, THE CONCEPT OF THE COMMON CARRIER IN ANGLO-AMERICAN LAW 183-86 (1971); *see also* Note, *Carriers: Common Carriage Distinguished from Contract Carriage: United States v. Contract Steel Carriers*, 350 U.S. 409 (1956), 43 CORNELL L. Q. 96, 99 (1957) [hereinafter "Cornell Note"] (Although some decisions have suggested that one distinction between common and contract carriage involves the ability of a contract carrier to select and reject shippers for whom it will haul, "this test seems questionable.") The distinction is further blurred because some entities that are treated as common carriers for their firm transportation services are regulated as contract carriers for their interuptible services. Hirschbach, *supra*, at 15-16 (return trip shipments, or those to fill the excess capacity of transporters, were traditionally treated as contract carriage).

tributes of Order No. 436 transportation, however, differ significantly from common law concepts of common carriage and are more akin to contract carriage than to common carriage.

First, as noted, the nondiscrimination condition is optional because the entire program is optional. Common carrier status under common law is mandatory for anyone engaged in the relevant business.

Second, common carriers generally are not allowed to offer discounts or rebates from their published rates. *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 345 (1946). In contrast, although a gas pipeline operating under Order No. 436 must file tariffs at FERC publishing its maximum and minimum transportation rates, it is free to practice "selective discounting" within that range without such discounting being deemed unduly discriminatory. *See* 18 C.F.R. § 284.7(d)(5) (1987); App. A at 1a-2a.

Third, in cases of insufficient pipeline capacity, FERC has interpreted Order No. 436 to permit a pipeline to curtail service to the party with the last-executed contract(s) before curtailing transportation to others.[36] In contrast, common law common carriage dictates that, in cases of limited pipeline capacity, all shippers must be afforded some capacity on a *pro rata* basis.[37]

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[36] *See, e.g.*, El Paso Natural Gas Co., 35 FERC (CCH) ¶ 61,440 at 62,061 (1986), *reh. denied*, 38 FERC (CCH) ¶ 61,008 (1987), *appeal docketed sub nom.* Mobil Oil Expl. & Prod., Southeast, Inc. v. FERC, No. 87-4016 (5th Cir., filed Jan. 13, 1987), *motion for remand granted* (Sept. 10, 1987).

[37] *See, e.g.*, Belle Fourche Pipeline Co., 28 FERC (CCH) ¶ 61,150 at 61,281-82 (1984); Powder River Pipeline Corp. v. Amoco Pipeline Co., 10 FERC (CCH) ¶ 61,044 at 61,108 (1980); *id.*, 4 FERC (CCH) ¶ 61,338 at 61,811 (1978); J. Hansen, UNITED STATES OIL PIPELINE MARKETS 73 (MIT Press 1983) (oil pipelines, which are common carriers under the Interstate Commerce Act, must afford proportionate service during times of insufficient capacity).

Fourth, Order No. 436 transportation requires the parties to enter into a formal contractual relationship with at least some major terms and conditions left to specific negotiation between the parties (*e.g.*, term of service, responsibility for construction costs, ownership of taps and other hook-ups, responsibility for installation and maintenance of metering devices). In contrast, "[c]ommon carriers, as a general rule, do not require the signing of a specific contract, or, at least, the shipper is not usually aware of signing such a contract." [38]

In addition, Order No. 436 transportation deviates from the traditional definition of common carriage in other ways as well. For example, FERC tolerates a priority for sales and transportation customers which had contracts with the pipeline prior to the date FERC acted on its blanket certificate application.[39] FERC also allows existing firm sales customers of the pipeline that are converting to transportation to receive a priority in the allocation of transportation capacity. 18 C.F.R. § 284.10 (c) (1987); App. A at 18a-20a. Such priorities are inconsistent with common law common carriage.

C. NGPA Section 602(b)(2) Was Not Designed to Restrain FERC from Imposing Nondiscriminatory Access Conditions on Blanket Transportation Authorizations.

Petitioners view NGPA Section 602(b)(2)[40] as a Congressional prohibition on the Commission's use of its broad authority under NGPA Sections 311(c) and 501(a) to condition transportation authorized under NGPA Sec-

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[38] Campbell, *supra* note 35, at 963; *see also* Hirschbach, *supra* note 35, at 15-16 (dedication of equipment [*e.g.*, lines, taps, meters] to the exclusive use of a shipper is a hallmark of contract carriage).

[39] *See, e.g.*, Texas Eastern Transmission Corp., 41 FERC (CCH) ¶ 61,015 at 61,027 (1987), *appeal docketed*, Texaco, Inc. v. FERC, No. 87-4735 (5th Cir., filed Oct. 15, 1987); Texas Eastern Transmission Corp. v. FERC, No. 87-1774 (D.C. Cir., filed Dec. 15, 1987).

[40] App. A at 1a.

tion 311(a). (INGAA at 14-17; AEPCO at 10-17, TETCO at 9-14; *see also* ANR at 8.) FERC and the *AGD* court soundly rejected that interpretation. 824 F.2d at 1002-03; J.A. at 35a. Moreover, nothing in the legislative history of those sections supports that interpretation. Instead, it appears that Section 602(b) was merely intended to allay the concerns of interstate and intrastate pipelines that they would inadvertently become subject to *other* state or federal common carrier statutes[41] solely "by reason of" either volunteering to perform transportation authorized by FERC under Section 311(a) or by responding to a presidential order requiring transportation in an emergency.[42] As the *AGD*

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[41] The *AGD* court identified Texas case law, opinions of the attorney general, and statutes that could have been triggered by a pipeline engaging in Section 311(a) transportation. 824 F.2d at 1002. *See also* MICH. COMP. LAWS ANN. § 483.110 (West 1979). The *AGD* court did not find comparable federal statutes; however, several such miscellaneous statutes exist that impose duties on or create an exposure for common carriers that is not applicable to non-common carriers. *See, e.g.*, Clayton Act, § 10, 15 U.S.C. § 20 (1982) (prohibiting common carriers from certain dealings in securities, supplies, or contracts with companies with whom they have interlocking directorates); Tariff Act of 1930, § 551, 19 U.S.C. § 1551 (1982) (authorizing Secretary of Treasury to impose bonding requirements on common carriers); Act of March 19, 1918, § 1, 15 U.S.C. § 261 (1982) (requiring common carriers to observe standard time zones); Employers' Liability Act, § 10, 45 U.S.C. § 60 (1982) (imposing penalties on common carriers for preventing employees from furnishing information concerning deaths or injuries); Foreign Intelligence Surveillance Act of 1978, § 105, 50 U.S.C. § 1805 (b)(2)(B) (1982) (automatically obligating common carriers to furnish information, facilities and technical assistance to aid in accomplishing secret surveillance); Postal Reorganization Act, § 603, 39 U.S.C. § 603 (1982) (allowing Postal Service searches of common carrier offices). The quoted language could also have been intended to protect pipelines transporting under NGPA Section 311 from both "overlooked" federal provisions and/or future federal provisions yet to be enacted.

[42] *See* National Energy Act, Report of the Ad Hoc Committee on Energy, U.S. House of Representatives, on H.R. 8444, Rep. No.

court noted, if pipelines refused to transport under Section 311(a) because of the risk of additional federal or state obligations, that refusal would impede the statutory purpose of removing a major barrier between interstate and intrastate movement of gas. 824 F.2d at 1002; J.A. at 35a-36a.

Petitioners dispute the interpretation of NGPA Section 602(b)(2) adopted by the court below. They claim that Congress intended this section to be read as a specific limitation on FERC authority to regulate gas pipelines. (AEPCO at 10-12; INGAA at 14-15; TETCO at 9-10.) This claim ignores the fact that Congress used nearly identical language in two other gas regulatory acts passed the same day as the NGPA to protect *end users* from being subject to regulation as common carriers under Federal or State law solely by virtue of their voluntary actions to comply with those acts.[43] The appearance of comparable provisions in other contemporaneous acts confirms that Section 602(b)(2) was *not* enacted to protect pipelines from FERC efforts to remedy their unduly discriminatory practices.

The *AGD* court's interpretation of the scope of NGPA Section 602(b) is further supported by the title of Sec-

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95-543, 95th Cong., 1st Sess. 45 (1977); 123 CONG. REC. H.R. 8382 (Aug. 3, 1977). Pipelines previously had been insulated from common carrier statutes due to the bifurcation of interstate and intrastate markets maintained by the Natural Gas Act.

[43] *See* Public Utility Regulatory Policies Act of 1978, § 606(f)(2), 15 U.S.C. § 717(f)(2) (1982) (gas users would not become common carriers if they voluntarily converted to heavy fuel oil and sold, transported or assigned their contracts for gas supplies to pipelines, distributors or high priority users); Powerplant and Industrial Fuel Use Act of 1978, § 731(f)(2), 15 U.S.C. § 8441(f)(2) (1982) (any person receiving gas for a use outlawed by the act may transfer its interest in such gas without becoming subject to regulation as a common carrier under any provision of Federal or State law solely by virtue of its sale, transportation or assignment of such gas rights).

tion 602—"Effect on State Laws."[44] This title clearly signals that the primary purpose of Section 602(b) was to insulate pipelines engaged in Section 311(a) transportation from being treated as common carriers under state laws, not to force FERC to condone undue discrimination and anticompetitive practices by pipelines.[45]

The *AGD* court further buttressed its interpretation of NGPA Section 602 by noting, correctly, that Congress hardly could have intended a limitation on the President's powers to order gas transportation in an emergency, if the President were to order transportation akin to that of common carriage. 824 F.2d at 1003; J.A. at 37a. In addition, even though the *AGD* court reached an independent conclusion that NGPA Section 602(b)(2) does not bar FERC from conditioning transportation pursuant to Section 311(a) on a commitment to provide nondiscriminatory access, it also upheld FERC's own interpretation of Section 602 as reasonable.[46]

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[44] When section titles are enacted as part of a statute, as they were in the NGPA, they may be used in the process of statutory construction. *See* 2A SUTHERLAND STATUTORY CONSTR. § 47.14, at 151 (4th ed. 1984); Office of Consumers' Counsel v. FERC, 783 F.2d 206, 219 (D.C. Cir. 1986) (beginning interpretation of NGPA § 601(c)(2) by reviewing its title).

[45] If Congress had intended Section 602(b)(2) to operate as a limitation on FERC's power under the NGPA to authorize transportation subject to conditions needed to protect the public interest, as Petitioners allege, this limitation would have been included in Section 311 itself, and not in a separate title for "miscellaneous" provisions in a section entitled "Effect on State Laws."

[46] 824 F.2d at 1003; J.A. at 37a, *citing* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). This Court's teachings in *Chevron* dictate that, when there are two or more equally plausible readings of a statute, the question for a reviewing court is whether the agency's construction is a permissible one. 467 U.S. at 843 & n.11.

D. Midwest Video is Neither Relevant Nor Controlling.

Petitioners rely heavily on this Court's decision in *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) ("*Midwest Video II*"), to contend that Order No. 436 improperly forces pipelines to become common carriers because, they allege, the nondiscriminatory access condition set forth at Sections 284.8(b) and 284.9(b) of FERC's regulations is the "essence of common carriage." (AEPCO at 9-12; INGAA at 7-9; TETCO at 5-6.) However, *Midwest Video II* interpreted and applied the concept of "common carriage" in the highly particularized context of the Communications Act of 1934 ("Communications Act" or "Act"),[47] and not in the context of the gas acts. Based on the significant dissimilarities between the legislative purposes and statutory structure of the Communications Act, on the one hand, and the NGA and the NGPA on the other, the Court of Appeals found, correctly, that *Midwest Video II* is of marginal relevance in the context of gas pipeline regulation. 824 F.2d at 998; J.A. at 27a.

First, the structure of the NGA and the NGPA is plainly different from that of the Communications Act. Specifically, the two natural gas statutes do not share the Communications Act's bifurcated structure[48] in which two mutually exclusive congressional objectives are expressed. Significantly, Title III of the Communications Act (regulating broadcasters) contains no antidiscrimination provision and gives the FCC no authority to impose a nondiscrimination requirement. Accordingly, this Court held in *Midwest Video II* the FCC had no authority under Title III to promulgate the cable television access rules at issue there.

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[47] 47 U.S.C. §§ 151, *et seq.* (1982).

[48] Title II of that Act regulates radio common carriers and requires open access to all would-be users of common carrier service. Title III, discussed in the text, is fundamentally different.

By contrast, the Natural Gas Act does *explicitly* require FERC to *assure* that natural gas companies do not grant undue preferences or advantages or otherwise engage in unduly discriminatory behavior. Natural Gas Act §§ 4(b), 5(a), 15 U.S.C. §§ 717c(b), 717d(a) (1982). Further, FERC has broad authority to prohibit discrimination and unreasonable transportation practices under the NGPA. *See* NGPA §§ 311(c), 501(a), 15 U.S.C. §§ 3371(c), 3411(a) (1982). Thus, there is a clear and logical nexus between FERC's jurisdiction to regulate gas transportation services and its power to order nondiscriminatory access as a condition to an optional blanket transportation program. It was the presence of just such a nexus that caused this Court to uphold the FCC's cable television program origination rules in *Midwest Video I*,[49] while rejecting its access rules in *Midwest Video II*, when no statutory nexus was shown. *See* 440 U.S. at 700.

Second, the Congressional purpose of journalistic independence, which justified overturning the FCC's access rules, finds no parallel in the gas statutes. The "unusual order of First Amendment values" [50] implicated in regulating the broadcast media is simply inapplicable to the regulation of natural gas companies.

Third, in *Midwest Video II*, the FCC's rules required open access behavior by *all* cable operators. In contrast, FERC has merely offered an optional alternative to the traditional method of obtaining authority to transport gas in interstate commerce. As noted, Order 436 permits, but does not require, self-implementing transportation services subject to a nondiscrimination condition which substitutes for prior FERC review of each transaction.

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[49] United States v. Midwest Video Corp., 406 U.S. 649 (1972).

[50] *See* Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 101 (1973); *see also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969).

III. SoCAL'S CHALLENGES TO THE OPTIONAL EXPEDITED CERTIFICATE REGULATIONS DO NOT WARRANT A WRIT OF CERTIORARI.

A. SoCal's Challenges are Premature.

At the outset, it bears emphasis that Petitioner Southern California Gas Company ("SoCal") challenges the Optional Expedited Certificate ("OEC") regulations only with respect to a single potential application of the OEC rules, *i.e.*, insofar as they potentially permit an interstate pipeline to "bypass" an LDC. By "bypass" SoCal has in mind the fear that its monopoly may not be absolute because an interstate pipeline might in the future be allowed to serve directly a customer which was traditionally a customer of SoCal.

Although the OEC regulations might, in the future, be invoked by an interstate pipeline that directly seeks to serve an existing customer of an LDC, it remains speculative whether the OEC rules will ever produce the results feared by SoCal. The OEC regulations apply broadly to a variety of potential transactions for which a certificate of public convenience and necessity is required under the NGA. For example, the OEC procedures may be invoked for expedited approval of a pipeline's construction of new facilities and/or rendition of new services for the direct benefit of LDCs[51] or fellow pipelines or end users who are not currently buying gas from anyone.[52] To date, the Commission has issued but one

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[51] For example, several LDC affiliates are partners in an OEC proposal for a project that would import natural gas from Canada largely for LDC system supply. *See* Iroquois Gas Transmission Co., FERC Docket No. CP86-523. Curiously, SoCal appears mistakenly to suggest that this proposed OEC project, which would benefit its fellow LDCs and Northeast U.S. consumers generally, is a proposed bypass of an LDC.

[52] For example, one OEC application proposes to serve the California enhanced oil recovery ("EOR") market. Wyoming-California Pipeline Company, 52 Fed. Reg. 23266 (June 26, 1986) (hereinafter

OEC certificate, and it is intended to benefit an LDC.[53]

Further, as the court below correctly determined,[54] the OEC procedures are not yet ripe for review because it remains to be seen whether FERC will deny a request for hearing with respect to an OEC application.[55] Even if FERC does deny a live hearing in a particular case, the circumstances may warrant denial of the hearing in that case.[56] In any event, whether the application of the OEC procedures would deprive a protestant of its rights cannot be determined in the abstract in this proceeding but must be resolved based on the factual record of an individual proceeding.[57]

B. The OEC Regulations Are Within FERC's Statutory Authority.

Fundamentally, SoCal bases its argument on the erroneous premise that the OEC regulations create an irrebuttable presumption in favor of LDC bypass. The regulations do not address bypass *per se*. Based on sub-

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"Wy-Cal"). Although SoCal contends that the proposed service would result in bypass, in fact much of the EOR market is not currently burning natural gas, and thus this is largely a case of SoCal competing with a pipeline for a new market.

[53] Moraine Pipeline Company, 42 FERC (CCH) ¶ 61,144 (February 2, 1988).

[54] *AGD*, 824 F.2d at 1031-33.

[55] Indeed, FERC may well modify the OEC procedures as part of its final self-implementing transportation rule.

[56] Formal hearings, for example, are not required under the NGA when there are no material issues of fact in dispute. *See* Cerro Wire & Cable Co. v. FERC, 677 F.2d 124, 128-29 (D.C. Cir. 1982).

[57] SoCal has intervened in the Wy-Cal proceeding and will have the opportunity there to seek review of the OEC procedures in a concrete factual setting if (1) its rights are denied and (2) FERC grants that application. SoCal's attack on the OEC regulations appears to be motivated by its desire to protect its regulatory monopoly against competition for new markets from Wy-Cal's proposal to build a new interstate pipeline. Consequently, its challenge properly lies there.

stantial record evidence, however, the OEC regulations do include a rebuttable presumption in favor of applicants that satisfy criteria designed by the FERC to assure that they assume the full economic risk of the venture. Both the FERC and the court below considered and properly rejected arguments by SoCal Gas and others that bypass would shift costs to residential customers. Such claims are at best speculative and, moreover, are contradicted by record evidence.

SoCal's argument that FERC abruptly changed a long-standing policy favoring service by LDCs over direct pipeline service to end users is incorrect. While some decisions have provided for service by an LDC rather than directly by a pipeline, this has by no means been a consistent rule.[58] Furthermore, FERC may change any alleged policy in favor of service by LDCs where, as here, circumstances warrant a new policy.

Contrary to SoCal's assertion, the OEC's rebuttable presumption does not improperly shift the burden of proof.[59] Under traditional NGA Section 7(c) procedures, the applicant has the burden of establishing a *prima facie* case that the certificate is required by the public convenience and necessity and, thereafter, the burden of going forward with evidence shifts to the protestant.[60] The OEC procedures simply expedite the initial burden of going forward through the use of a presumption which may be rebutted by appropriate evidence. In any

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[58] *See, e.g.*, Opinion 275-A, Panhandle Eastern Pipe Line Company, 40 FERC (CCH) ¶ 61,220 (1987); American Distribution Company (Alabama Division), 37 FERC (CCH) ¶ 61,282 (Dec. 23, 1986).

[59] In Order Nos. 436 and 436-A FERC made clear that "[b]urden of proof issues, to the extent that they arise in individual cases, will be resolved in accordance with the Administrative Procedure Act ["APA"]." Order No. 436, *supra*, note 1, at 31,584-85; J.A. at C-121 through 122.

[60] *See* Transcontinental Gas Pipeline Corporation, 33 F.P.C. 237, 265 (1965).

event, the Commission will make a specific finding as to whether the public convenience and necessity are served in each case,[61] and any aggrieved party may seek judicial review.

SoCal's reliance upon *American Distribution Company (Alabama Division)*,[62] is misplaced. That case did *not* involve an OEC proceeding, but rather was a traditional NGA Section 7 certificate application seeking authority to serve a municipal distribution system for ultimate redelivery to an industrial customer.

Finally, SoCal's assertion that it merely seeks the "opportunity for specific review of bypass applications which consider all relevant factors" is misleading. *First*, the OEC regulations provide it with such an opportunity. The regulations require that, in the case of a proposed bypass, an affected LDC and state commission must be given direct notice. Those parties will be provided an opportunity to rebut the presumption in favor of an OEC application. *Second*, SoCal is really seeking a procedural vehicle designed to defeat competition by interjecting needless delay through protracted formal proceedings. Use of such delay to block competition is contrary to the public interest and wholly inconsistent with the aims of the NGPA and the broad competitive goals supported by the FERC's rulemaking.

C. There Is No Jurisdictional Conflict.

SoCal presents no jurisdictional issues that would warrant issuance of a writ of *certiorari*. SoCal's argument concerning an alleged need to clarify the scope of state jurisdiction over transportation within its boundaries is based on the incorrect premise that, through its OEC

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[61] To illustrate, in approving the only OEC certificate granted to date, the FERC held that "based on the evidence in the record before us, *and without relying on any presumption*, we find that Moraine's proposal as modified, is required by the public convenience and necessity" (emphasis added). Moraine Pipeline Co., *supra* note 53, mimeo at 18.

[62] 37 FERC (CCH) ¶ 61,282 (1986).

regulations, FERC has abandoned regulation of an aspect of interstate transportation. Contrary to SoCal, FERC will continue to exercise its jurisdiction to regulate the interstate transportation of gas to end users just as it has in the past. FERC has simply reduced the danger of pointless litigation delay in cases in which the parties to a transaction assume the full economic risks of their transaction. FERC's OEC rules have not created a regulatory gap, nor has SoCal set forth any basis for interfering with FERC's exercise in this instance of its exclusive jurisdiction over interstate transportation of natural gas.

CONCLUSION

For the foregoing reasons, the Petitioners for Writ of Certiorari addressed herein should be denied.

Respectfully submitted,

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March 16, 1988

APPENDIX A

APPENDIX A

NGPA Section 602(b), 15 U.S.C. § 3432(b) (1982):

EFFECT ON STATE LAWS.

. . .

(b) Common Carriers.—No person shall be subject to regulation as a common carrier under any provision of Federal or State law by reason of any transportation—

(1) [pursuant to presidential order requiring transportation in an emergency; or]

(2) authorized by the Commission under section 311(a) of this Act.

18 C.F.R. Part 284:

§ 284.7 Rates.

* * * *

(d) Rate design.

* * * *

(5) Rate flexibility.

(i) Any rate schedule filed under this section must state a maximum rate and a minimum rate.

(ii) The pipeline may charge an individual customer any rate that is neither greater than the maximum rate nor less than the minimum rate on file for that service.

(iii) The pipeline may not file a revised or new rate designed to recover costs not recovered under rates previously in effect.

(iv) If, during any billing period, a pipeline charges a rate or collects a reservation fee that is less than the maximum rate or fee, the pipeline must, within 15 days of the close of the billing period, file a report with the Commission identifying:

(A) The maximum rate or fee and the rate or fee actually charged during the billing period;

(B) The shipper; and

(C) Any corporate affiliation between the shipper and the transporting pipeline.

§ 284.8 Firm transportation service.

(a) *Firm transportation availability.* (1) An interstate pipeline that provides transportation service under Subpart B, G or H must offer such transportation service on a firm basis.

(2) An intrastate pipeline that provides transportation service under Subpart C may offer such transportation service on a firm basis.

(3) "Service on a firm basis" means that the service is not subject to a prior claim by another customer or another class of service and receives the same priority as any other class of firm service.

(b) *Non-discriminatory access.* An interstate pipeline or intrastate pipeline that offers transportation service on a firm basis under Subpart B, C, G or H must provide such service without undue discrimination, or preference, including undue discrimination or preference in the quality of service provided, the duration of service, the categories, prices, or volumes of natural gas to be transported, customer classification, or undue discrimination or preference of any kind.

(c) *Reasonable operational conditions.* Consistent with paragraph (b) of this section, a pipeline may impose reasonable operational conditions on any service provided under this part. Such conditions must be filed by the pipeline as part of its transportation tariff.

(d) *Reservation fee.* Where a customer purchases firm service, a pipeline may impose a reservation fee or charge on a shipper as a condition for providing such service. The reservation fee may not recover any variable costs or any fixed costs in excess of those costs that would be recovered by using the same ratemaking meth-

odology used for determining the demand charge in the pipeline's sales rates. Except as provided in this paragraph, the pipeline may not include in a rate for any transportation service provided under Subpart B, C, G or H any minimum bill or minimum take provision, or any other provision that has the effect of guaranteeing revenue.

(e) *Limitation.* A person providing service under Subpart B, C, G or H of this part is not required to provide any requested transportation service for which capacity is not available or that would require the construction or acquisition of any new facilities.

(f) (1) *Transportation credits.* Natural gas is eligible for transportation by interstate pipelines under this part only if:

(i) The pipeline and the shipper or producer agree, or

(ii) An offer has been submitted to the pipeline satisfying the requirements of paragraph (f)(2) of this section.

(2) An offer to satisfy this section need not be notarized but must:

(i) Identify the gas made eligible for transportation through the filing of the offer,

(ii) Be signed by the producer and all other persons who own at least 85 percent of the volumes of gas for which take-or-pay or take-and-pay credits are required to be offered under this section in connection with the transportation of the subject gas, and

(iii) Constitute an offer, which upon acceptance by the pipeline will result in a contract binding on the producers and their assignees, to grant the pipeline any credits under this section in connection with the transportation of the subject gas. The requirements of this section may be satisfied by a general offer applicable to all transportation transactions involving the subject gas.

(iv) Where a pipeline receives offer(s) of credits covering at least 85 percent of the volumes to be transported and signed by the producers and all other persons required to offer take-or-pay or take-and-pay credits under this section in connection with the transportation of the subject gas, the pipeline must be provided with the names of the persons or entities that have not signed and comprise the 15 percent (or lower) volumetric minority.

(v) If, at any time after the commencement of a transaction under section 284.8(f)(2)(iv) above, any one of those producers or other persons that did not submit an offer of credits should subsequently sign and tender a document offering take-or-pay and take-and-pay credits pursuant to this part, then that producer or other person must also provide credits for any of its volumes transported in the transaction where it was in the 15 percent (or lower) volumetric minority not signing an offer of credits.

(3) Once the offer and names required by this section are submitted to the pipeline, the pipeline must transport the gas, subject to the conditions of this part, notwithstanding any dispute concerning either the adequacy of the offer made under § 284.8(f)(1)(ii) or how the crediting is to be performed.

(4) If a pipeline is requested to transport gas which on June 23, 1987, was owned by a producer who on that date owned gas sold to the pipeline under a contract or contracts executed before June 23, 1987, which contain take-or-pay or take-and-pay provisions, and receives the offer required by paragraph (f)(2) of this section, the pipeline may receive credits as follows:

(i) For each unit of gas transported that is owned by that producer on June 23, 1987, the pipeline will receive credit for the volumes transported as though they were volumes of that producer's gas purchased by the pipeline under any contract existing on or before June 23, 1987, which contains a take-or-pay or take-and-pay provision.

(ii) The selection of the contracts against which the credits will apply will be at the discretion of the pipeline. However, the pipeline may not apply credits against its obligation, under a take-and-pay contract, to take gas which under state law in effect on June 23, 1987, was defined as casinghead gas.

(iii) The pipeline may, at its discretion, apply the credit as though the volumes were purchased in the contract year in which the gas was transported or in any previous calendar year, commencing on or after January 1, 1986, in which the pipeline transported natural gas pursuant to the nondiscriminatory access provisions of §§ 284.8(b) and 284.9(b) of this part.

(iv) When a pipeline has released gas from a gas purchase contract and, as part of the release agreement, the parties have agreed to a crediting of the released gas against the pipeline's take-or-pay or take-and-pay liability under that contract, the releasing pipeline nonetheless may, at its discretion, receive credits pursuant to this section for transporting the released gas. However, the pipeline may not receive more than a volume for volume credit. Therefore, if a pipeline chooses to receive credits under this section, it must discharge the producer from all other crediting arrangements agreed to in the release agreement or otherwise provided in the gas purchase contract. In addition, for purposes of determining the pipeline's take-or-pay liability under the released contract, the pipeline may not claim that the annual deliverability of gas under the released contract is reduced by the volumes credited against another contract.

(v) If, as a result of the release, there are insufficient gas reserves subject to the release contract to allow the pipeline to receive delivery of gas for which it has made prepayments pursuant to the released contract, the producer must, at its option, either repay the prepayments to the extent of any insufficiency caused by the release or satisfy any make up rights of the pipeline under the contract through delivery of a like quantity of

gas from either gas committed to the contract which was credited or some other source.

(vi) If the transported gas was not owned by any producer on June 23, 1987, the pipeline may receive credits, as provided in this section.

(5) When the gas is transported by more than one pipeline and the gas was released from a contract between the producer and one of the transporting pipelines, only the pipeline which is a party to the contract from which the gas is released may receive credit under this section. No other pipeline providing transportation may receive a credit. In all other cases, when more than one pipeline is requested to transport the same gas, the credit is to be applied to the take-or-pay or take-and-pay obligations of all the pipelines engaged in the transaction but is not required to exceed the amount of the gas transported. The pipelines may agree among themselves how the credits should be allocated among their prepayment obligations. Failure by the pipelines to agree as to such an allocation of the credits will not render the gas ineligible for transportation. If transportation begins before the pipelines agree on an allocation formula, the allocation formula subsequently agreed upon will apply from the date transportation commenced.

(6) If on September 15, 1987, a pipeline is transporing gas owned by a producer on June 23, 1987, that gas will cease to be eligible for transportation under this part on January 1, 1988, unless the pipeline and the shipper or producer agree, or an offer of take-or-pay or take-and-pay credits has been submitted to the pipeline, as provided under paragraph (f)(2), offering the pipeline credits. Such credits shall commence from the date the offer of credits is submitted.

(7) Notwithstanding the above provisions, a producer is not required under this section to provide credits with respect to take-or-pay or take-and-pay obligations in order to obtain transportation of:

(i) Gas which:

(A) The producer formerly sold to the transporting pipeline under a contract which contained a take-or-pay or take-and-pay provision and which has been terminated, and

(B) Is not currently subject to a gas purchase contract between the pipeline and the producer, or

(ii) Gas which has been released from a gas purchase contract which contains or is subject to a market-out clause giving the purchaser the right to terminate the contract at the purchaser's discretion.

(8) *New natural gas.* Notwithstanding the above provisions, a producer is not required under this section to provide credits with respect to take-or-pay or take-and-pay obligations in order to obtain transportation of Order No. 500 new natural gas, as defined in paragraph (i). Also, a pipeline may not apply credits arising from the transportation of other gas against take-or-pay or take-and-pay obligations for Order No. 500 new natural gas.

(i) Order No. 500 new natural gas is:

(A) Natural gas produced from an Order No. 500 new well (as defined in paragraph ii) which is 2.5 miles or more from the nearest Order No. 500 marker well (as defined in paragraph iii) or from any completion location of any Order No. 500 new well which is located at a depth of least 1,000 feet below the deepest completion location of each Order No. 500 marker well within 2.5 miles of such new well, or

(B) Natural gas produced from an Order No. 500 new well and from a reservoir from which natural gas was not produced in commercial quantities before June 23, 1987.

(ii) An Order No. 500 new well is any well the surface drilling of which began on or after June 23, 1987 or the depth of which was increased, by means of drilling

on or after June 23, 1987, to a completion location which is located at least 1,000 feet below the depth of the deepest completion location of such well attained before June 23, 1987.

(iii) An Order No. 500 marker well is any well from which natural gas was produced in commercial quantities at any time after January 1, 1970 and before June 23, 1987.

(iv) For purposes of determining the distance from any Order No. 500 new well to any Order No. 500 marker well, the measurement shall be the horizontal distance from the surface location of the Order No. 500 new well to the surface location of the Order No. 500 marker well.

(9) *Intrastate system supply.* Notwithstanding the above provisions, a producer is not required under this section to provide credits with respect to take-or-pay or take-and-pay obligations in connection with an interstate pipeline's transportation after January 1, 1988 of gas released from an intrastate pipeline's system supply gas, for average daily quantities transported by the interstate pipeline which do not exceed the average daily quantities transported in November 1987 under its reported transaction, if:

(i) The intrastate pipeline has released that gas under a release agreement providing the intrastate pipeline take-or-pay credits for transporting that gas against the pipeline's take-or-pay or take-and-pay liability under the contract from which the gas has been released,

(ii) The intrastate pipeline and interstate pipeline transport the gas in transactions commenced on or before November 15, 1987,

(iii) The intrastate pipeline reported its transportation transaction to the Commission pursuant to § 284.126 (a), and

(iv) The interstate pipeline reported its transportation transaction to the Commission pursuant to § 284.106.

(10) *Special rule for certain processing plant resales.*

(i) Natural gas which a processing plant operator purchased under percentage-of-proceeds contracts, entered into on or before June 23, 1987, with behind-the-plant producers and which the processing plant operator resells at the plant's tailgate is eligible for transportation by interstate pipelines when:

(A) The pipeline and the shipper or processing plant operator agree, or

(B) An offer has been submitted to the pipeline (*1*) signed by the processing plant operator and (*2*) identifying the gas made eligible for transportation through the filing of the offer, (*3*) which, upon acceptance of the pipeline, will result in a contract binding on the processing plant operator to grant the pipeline credits, as provided in this section subject to the limitation in paragraph (f)(10)(ii), in connection with the transportation of the subject gas.

(ii) Credits arising from the transportation after January 1, 1988 of the gas described in paragraph (f)(10)(i) may be applied only against the transporting pipeline's take-or-pay or take-and-pay obligation under a pre-June 23, 1987 contract with the processing plant operator from which that pipeline has released the transported gas.

(11) *Offers to act as a guarantor.* (i) Where the working interest owners of 85 percent of the gas tendered for transportation do not sign offers of credits, that gas nevertheless shall be eligible for transportation if some other person offers to act as guarantor for non-signing producers such that 85 percent of the gas is covered either by offers or credits or offers to act as guarantor.

(ii) An offer to act as guarantor must:

(A) Identify the gas which will be transported pursuant to the offer and the producer of that gas,

(B) Be signed by the guarantor, and

(C) Constitute an offer, which upon acceptance by the pipeline, will result in a contract binding on the guarantor to pay the pipeline the amount by which the pipeline's take-or-pay or take-and-pay payments to the producer would have been reduced had the producer offered the pipeline credits under Order No. 500.

§ 284.9 Interruptible transportation service.

(a) Interruptible transportation availability. (1) An interstate pipeline that provides firm transportation under Subpart B, G or H must also offer transportation service on an interruptible basis under that subpart or subparts.

(2) An intrastate pipeline that provides transportation service under Subpart C may offer such transportation service on an interruptible basis.

(3) "Service on an interruptible basis" means that the capacity used to provide the service is subject to a prior claim by another customer or another class of service and receives a lower priority than such other classes of service.

(b) *Non-discriminatory access.* An interstate or intrastate pipeline that offers interruptible service under Subpart B, C, G or H must provide such service without undue discrimination, or preference, including undue discrimination or preference in the quality of service provided, the duration of service, the categories, prices, or volumes of natural gas to be transported, customer classification, or undue discrimination or preference of any kind.

(c) *Reasonable operational conditions.* Consistent with paragraph (b) of this section, a pipeline may impose

reasonable operational conditions on any service provided under this part. Such conditions must be filed by the pipeline as part of its transportation tariff.

(d) *Reservation fee.* No reservation fee may be imposed for interruptible service. A pipeline's rate for any transportation service provided under this section may not include any minimum bill provision, minimum take provision, or any other provision that has the effect of guaranteeing revenue.

(e) *Limitation.* A person providing service under Subparts B, C, G or H of this part is not required to provide any requested transportation service for which capacity is not available or that would require the construction or acquisition of any new facilities.

(f) (1) *Transportation credits.* Natural gas is eligible for transportation by interstate pipelines under this part only if:

(i) The pipeline and the shipper or producer agree, or

(ii) An offer has been submitted to the pipeline satisfying the requirements of paragraph (f) (2) of this section.

(2) An offer to satisfy this section need not be notarized but must:

(i) Identify the gas made eligible for transportation through the filing of the offer,

(ii) Be signed by the producer and all other persons who own at least 85 percent of the volumes of gas for which take-or-pay or take-and-pay credits are required to be offered under this section in connection with the transportation of the subject gas, and

(iii) Constitute an offer, which upon acceptance by the pipeline will result in a contract binding on the producers and their assignees, to grant the pipeline any credits under this section in connection with the transportation of the subject gas. The requirements of this section may

be satisfied by a general offer applicable to all transportation transactions involving the subject gas.

(iv) Where a pipeline receives offer(s) of credits covering at least 85 percent of the volumes to be transported and signed by the producers and all other persons required to offer take-or-pay or take-and-pay credits under this section in connection with the transportation of the subject gas, the pipeline must be provided with the names of the persons or entities that have not signed and comprise the 15 percent (or lower) volumetric minority.

(v) If, at any time after the commencement of a transaction under section 284.9(f)(2)(iv) above, any one of those producers or other persons that did not submit an offer of credits should subsequently sign and tender a document offering take-or-pay and take-and-pay credits pursuant to this part, then that producer or other person must also provide credits for any of its volumes transported in the transaction where it was in the 15 percent (or lower) volumetric minority not signing an offer of credits.

(3) Once the offer and names required by this section are submitted to the pipeline, the pipeline must transport the gas, subject to the conditions of this part, notwithstanding any dispute concerning either the adequacy of the offer made under § 284.9(f)(1)(ii) or how the crediting is to be performed.

(4) If a pipeline is requested to transport gas which on June 23, 1987, was owned by a producer who on that date owned gas sold to the pipeline under a contract or contracts executed before June 23, 1987, which contains take-or-pay or take-and-pay provisions, and receives the offer required by paragraph (f)(2) of this section, the pipeline may receive credits as follows:

(i) For each unit of gas transported that is owned by that producer on June 23, 1987, the pipeline will receive credit for the volumes transported as though they were

volumes of that producer's gas purchased by the pipeline under any contract existing on or before June 23, 1987, which contains a take-or-pay or take-and-pay provision.

(ii) The selection of the contracts against which the credits will apply will be at the discretion of the pipeline. However, the pipeline may not apply credits against its obligation, under a take-and-pay contract, to take gas which under state law in effect on June 23, 1987, was defined as casinghead gas.

(iii) The pipeline may, at its discretion, apply the credit as though the volumes were purchased in the contract year in which the gas was transported or in any previous calendar year, commencing on or after January 1, 1986, in which the pipeline transported natural gas pursuant to the nondiscriminatory access provisions of §§ 284.8(b) and 284.9(b) of this part.

(iv) When a pipeline has released gas from a gas purchase contract and, as part of the release agreement, the parties have agreed to a crediting of the released gas against the pipeline's take-or-pay or take-and-pay liability under that contract, the releasing pipeline nonetheless may, at its discretion, receive credits pursuant to this section for transporting the released gas. However, the pipeline may not receive more than a volume for volume credit. Therefore, if a pipeline chooses to receive credits under this section, it must discharge the producer from all other crediting arrangements agreed to in the release agreement or otherwise provided in the gas purchase contract. In addition, for purposes of determining the pipeline's take-or-pay liability under the released contract, the pipeline may not claim that the annual deliverability of gas under the released contract is reduced by the volumes credited against another contract.

(v) If, as a result of the release, there are insufficient gas reserves subject to the release contract to allow the pipeline to receive delivery of gas for which it has made prepayments pursuant to the released contract, the pro-

ducer must, at its option, either repay the prepayments to the extent of any insufficiency caused by the release or satisfy any make up rights of the pipeline under the contract through delivery of a like quantity of gas from either gas committed to the contract which was credited or some other source.

(vi) If the transported gas was not owned by any producer on June 23, 1987, the pipeline may receive credits as provided in this section.

(5) When the gas is transported by more than one pipeline and the gas was released from a contract between the producer and one of the transporting pipelines, only the pipeline which is a party to the contract from which the gas is released may receive credit under this section. No other pipeline providing transportation may receive a credit. In all other cases, when more than one pipeline is requested to transport the same gas, the credit is to be applied to the take-or-pay or take-and-pay obligations of all the pipelines engaged in the transaction but is not required to exceed the amount of the gas transported. The pipelines may agree among themselves how the credits should be allocated among their prepayment obligations. Failure by the pipelines to agree as to such an allocation of the credits will not render the gas ineligible for transportation. If transportation begins before the pipelines agree on an allocation formula, the allocation formula subsequently agreed upon will apply from the date transportation commenced.

(6) If on September 15, 1987, a pipeline is transporting gas owned by a producer on June 23, 1987, that gas will cease to be eligible for transportation under this part on January 1, 1988, unless the pipeline and the shipper or producer agree, or an offer of take-or-pay or take-and-pay credits has been submitted to the pipeline, as provided under paragraph (f)(2), offering the pipeline credits. Such credits shall commence from the date the offer of credits is submitted.

(7) Notwithstanding the above provisions, a producer is not required under this section to provide credits with respect to take-or-pay or take-and-pay obligations in order to obtain transportation of:

(i) Gas which:

(A) The producer formerly sold to the transporting pipeline under a contract which contained a take-or-pay or take-and-pay provision and which has been terminated and

(B) Is not currently subject to a gas purchase contract between the pipeline and the producer, or

(ii) Gas which has been released from a gas purchase contract which contains or is subject to a market-out clause giving the purchaser the right to terminate the contract at the purchaser's discretion.

(8) *New natural gas.* Notwithstanding the above provisions, a producer is not required under this section to provide credits with respect to take-or-pay or take-and-pay obligations in order to obtain transportation of Order No. 500 new natural gas, as defined in paragraph (i). Also, a pipeline may not apply credits arising from the transportation of other gas against take-or-pay or take-and-pay obligations for Order No. 500 new natural gas.

(i) Order No. 500 new natural gas is: (A) Natural gas produced from an Order No. 500 new well (as defined in paragraph ii) which is 2.5 miles or more from the nearest Order No. 500 marker well (as defined in paragraph iii) or from any completion location of any Order No. 500 new well which is located at a depth at least 1,000 feet below the deepest completion location of each Order No. 500 marker well within 2.5 miles of such new well, or

(B) Natural gas produced from an Order No. 500 new well and from a reservoir from which natural gas

was not produced in commercial quantities before June 23, 1987.

(ii) An Order No. 500 new well is any well the surface drilling of which began on or after June 23, 1987 or the depth of which was increased, by means of drilling on or after June 23, 1987, to a completion location which is located at least 1,000 feet below the depth of the deepest completion location of such well attained before June 23, 1987.

(iii) An Order No. 500 marker well is any well from which natural gas was produced in commercial quantities at any time after January 1, 1970 and before June 23, 1987.

(iv) For purposes of determining the distance from any Order No. 500 new well to any Order No. 500 marker well, the measurement shall be the horizontal distance from the surface location of the Order No. 500 new well to the surface location of the Order No. 500 marker well.

(9) *Intrastate system supply.* Notwithstanding the above provisions, a producer is not required under this section to provide credits with respect to take-or-pay or take-and-pay obligations in connection with an interstate pipeline's transportation after January 1, 1988 of gas released from an intrastate pipeline's system supply gas, for average daily quantities transported by the interstate pipeline which do not exceed the average daily quantities transported in November 1987 under its reported transaction, if:

(i) The intrastate pipeline has released that gas under a release agreement providing the intrastate pipeline take-or-pay credits for transporting that gas against the pipeline's take-or-pay or take-and-pay liability under the contract from which the gas has been released,

(ii) The intrastate pipeline and interstate pipeline transport the gas in transactions commenced on or before November 15, 1987,

(iii) The intrastate pipeline reported its transportation transaction to the Commission pursuant to §284.126(a), and

(iv) The interstate pipeline reported its transportation transaction to the Commission pursuant to § 284.106.

(10) *Special rule for certain processing plant resales.*

(i) Natural gas which a processing plant operator purchased under percentage-of-proceeds contracts, entered into on or before June 23, 1987, with behind-the-plant producers and which the processing plant operator resells at the plant's tailgate is eligible for transportation by interstate pipelines when:

(A) The pipeline and the shipper or processing plant operator agree, or

(B) An offer has been submitted to the pipeline (1) signed by the processing plant operator and (2) identifying the gas made eligible for transportation through the filing of the offer, (3) which, upon acceptance of the pipeline, will result in a contract binding on the processing plant operator to grant the pipeline credits, as provided in this section subject to the limitation in paragraph (f)(10)(ii), in connection with the transportation of the subject gas.

(ii) Credits arising from the transportation from after January 1, 1988 of the gas described in paragraph (f)(10)(i) may be applied only against the transporting pipeline's take-or-pay or take-and-pay obligation under a pre-June 23, 1987 contract with the processing plant operator from which that pipeline has released the transported gas.

(11) Offers to act as guarantor. (i) Where the working interest owners of 85 percent of the gas tendered for transportation do not sign offers of credits, that gas nevertheless shall be eligible for transportation if some other person offers to act as guarantor for nonsigning producers such that 85 percent of the gas is covered either by offers of credits or offers to act as guarantor.

(ii) An offer to act as guarantor must: (A) Identify the gas which will be transported pursuant to the offer and the producer of that gas,

(B) Be signed by the guarantor, and

(C) Constitute an offer, which upon acceptance by the pipeline, will result in a contract binding on the guarantor to pay the pipeline the amount by which the pipeline's take-or-pay or take-and-pay payments to the producer would have been reduced had the producer offered the pipeline credits under Order No. 500.

§ 284.10 Conversion to firm transportation.

* * * *

(c) *Procedures.*

(1) *Customer option.* An interstate pipeline subject to this section agrees to offer, and is deemed to offer, each firm sales customer the option, under this paragraph, to convert a portion of its firm sales entitlements under any eligible firm sales service agreement to a volumetrically equal amount of firm transportation service.

(2) *Notice.* Unless the pipeline agrees otherwise, a customer that wishes to exercise its option under this paragraph must provide the pipeline written notice not later than 60 days before the proposed conversion.

(3) *Level of conversion.* (i) A customer of a pipeline subject to this section may convert to firm transportation its existing firm sales entitlements under any eligible firm sales service agreement with that pipeline, in accordance with the following schedule:

(A) During the first twelve-month period after the pipeline first becomes subject to this section, up to 15 percent of the level of its firm sales entitlements in existence on the date the pipeline first becomes subject to

this section, under any eligible firm sales service agreement with that pipeline;

(B) During the second twelve-month period after the pipeline first becomes subject to this section, up to 30 percent of the level of its firm sales entitlements in existence on the date the pipeline first becomes subject to this section, under any eligible firm sales service agreement with that pipeline;

(C) During the third twelve-month period after the pipeline first becomes subject to this section, up to 50 percent of the level of its firm sales entitlements in existence on the date the pipeline first becomes subject to this section, under any eligible firm sales service agreement with that pipeline;

(D) During the fourth twelve-month period after the pipeline first becomes subject to this section, up to 75 percent of the level of its firm sales entitlements in existence on the date the pipeline first becomes subject to this section, under any eligible firm sales service agreement with that pipeline; and

(E) Beginning the fifth twelve-month period after the pipeline first becomes subject to this section, up to 100 percent of the level of its firm sales entitlements in existence on the date the pipeline first becomes subject to this section, under any eligible firm sales service agreement with that pipeline;

(ii) A pipeline subject to this section may, at any time, permit a firm sales customer to convert to firm transportation by more than the amount provided in the schedule in paragraph (c)(3)(i) of this section.

(4) *Reservation fee.* Where a customer exercises its option under this paragraph to convert to firm transportation service, the pipeline may impose a reservation fee as provided in § 284.8(d) of this subpart.

(5) *Effect of conversion on minimum bills.* If a customer converts under this paragraph any portion of its firm sales entitlements from a pipeline, each unit of firm transportation service purchased must be credited to any minimum commodity bill obligation that the customer may have under its firm sales service agreements with that pipeline.

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